Supreme Court, U.S.
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No. 06-1448

In the
Supreme Court of the United States

MAMADOU SY,

Petitioner,

v.

ALBERTO GONZALES, Attorney General,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

E. DENNIS MUCHNICKI
Counsel of Record
LAW OFFICE OF E. DENNIS MUCHNICKI
5650 BLAZER PARKWAY
DUBLIN, OH 43017
(614) 761-9775

Counsel for Petitioner
Mamadou Sy

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED FOR REVIEW

Whether an alien's grant of asylum may be revoked solely on the basis of a report by a document analyst submitted to the immigration court by the Department of Homeland Security, Immigration and Customs Enforcement, after the close of the asylum hearing at which asylum was granted when the report establishes that documents submitted by the alien at the asylum hearing were not genuine but the report does not provide any information establishing that the alien knew or should have know of the non-genuine nature of the documents.

RULE 14(B) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition for is as follows:

1. Mamadou Sy who is the petitioner before this Court was also the petitioner before the United States Court of Appeals for the Sixth Circuit and the respondent before the Board of Immigration Appeals and Immigration Court.

2. Alberto Gonzales, Attorney General, who is the respondent on behalf of the United States of America before this Court was also the respondent on behalf of the United States of America before the United States Court of Appeals for the Sixth Circuit. The Board of Immigration Appeals whose final order was the subject of Mr. Sy's petition for review to the Sixth Circuit is a part of the Executive Office of Immigration Review, an office within the United States Department of Justice which is under the direct supervision of General Gonzales.

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PETITION FOR A WRIT OF CERTIORARI

Mamadou Sy, a refugee from Mauritania, respectfully petitions for a writ of certiorari to review the opinion and judgment of the U.S. Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Sixth Circuit, dated September 28, 2006, has never been officially reported. The non-official citations are 199 Fed. Appx. 444; and 2006 U.S. App. LEXIS 24561. The opinion is set forth at App. 3a.

The decision and final order of the Board of Immigration Appeals that was the subject of petition for review to the Sixth Circuit also has never been officially reported. The case number of this matter before the Board of Immigration Appeals is A76-898-266. The opinion is set forth at App. 3a.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit sought to be reviewed was entered on September 28, 2006. Mr. Sy filed a motion for rehearing on November 13, 2006. The motion for rehearing was denied on January 29, 2007. This petition is timely under 28 U.S.C. § 2101(C) and Supreme Court Rule 13.1 because it is being filed within 90 days of the denial of the motion for rehearing. This Court has jurisdiction to review the judgment of the U.S. Court of Appeals for the Sixth Circuit pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions involved are provisions of the Immigration and Nationality Act, 8 U.S.C. § 1158 establishing the standards governing the asylum program and 8 U.S.C. § 1324c defining document fraud. The relevant statutory provisions are reproduced at App. 49a.

STATEMENT OF THE CASE

This case arises from the Board of Immigration Appeals' April 17, 2004 final order affirming the August 24, 2000 decision of the Memphis Immigration Court, revoking the previous grant of asylum to Mr. Sy due to an allegedly counterfeit birth certificate that was admitted as evidence in the initial removal hearing. Mamadou Sy is a citizen of Mauritania who sought asylum in the United States due to persecution he suffered from the Mauritanian government due to his race.

Mr. Sy's original removal hearing was conducted on June 29, August 16 and December 15, 1999. At the conclusion of the December 15, 1999 hearing, Petitioner was granted asylum by the immigration judge. (App. 37a). While the INS did not appeal the grant of asylum, on February 3, 2000, the Immigration Court reconvened the hearing pursuant to a motion to reopen filed by the INS alleging that certain exhibits offered by Mr. Sy in the original asylum proceeding were fraudulent. (Certified Administrative Record, hereinafter "CAR"). The report prepared by a Department of Homeland Security (hereinafter "DHS") document examiner concluded that Exhibits 6 and 7 offered by Mr. Sy at the original asylum hearing were not genuine. (CAR 354).

Section 274C of the Immigration and Nationality Act, 8 U.S.C. § 1324c specifies that use of non-genuine documents for immigration purposes is unlawful if the person "knowingly" uses the non-genuine documents. At the reconvened hearing the author of the DHS report declaring that Exhibits 6 and 7 were not genuine explained that his conclusion was based upon a comparison of the exhibits with known exemplars that were not all-inclusive of Mauritanian documents by using "hand held magnification", a "stereo microscope", an "illuminated desk magnifier" and a "video spectra comparature". (CAR 302). Because it was necessary to use all of these sophisticated devices to establish the non-genuine nature of documents, the DHS report did not establish Mr. Sy "knew or should have known" that the documents he submitted were not genuine. Mr. Sy testified that Exhibits 6 and 7 were sent to him by his sister from Mauritania and he had no reason to suspect that she would provide him with non-genuine documents that would harm his asylum claim. (CAR 318-336). Despite the absence of any testimony or evidence concerning Mr. Sy's knowledge of the alleged non-genuine nature of Exhibits 6 and 7, the immigration judge on August 24, 2000 revoked the previous grant of asylum and ordered Mr. Sy removed from the United States. (App. 23a).

Mr. Sy filed a timely appeal to the Board of Immigration Appeals on September 21, 2000. After a series of motions and a previous remand from the Sixth Circuit to the BIA due to errors in the preparation of the Certified Administrative Record, on August 17, 2004 the BIA issued its final order affirming the immigration judge's revocation of asylum and order of removal. (App. 15a).

On September 10, 2004, Mr. Sy filed a timely petition for review from the BIA's final order to the United States Court

of Appeals for the Sixth Circuit pursuant to 8 U.S.C. § 1252. The Sixth Circuit affirmed the BIA on September 28, 2006. (App. 3a). On January 29, 2007 the Court of Appeals issued its decision denying Mr. Sy's motion for rehearing. (App. 1a).

Review by certiorari to the U.S. Court of Appeals for the Sixth Circuit is sought pursuant to 28 U.S.C. § 2101(C) and 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE PETITION

The Board of Immigration Appeals has established a general rule that an asylum claimant has an obligation to produce evidence to corroborate his claim of persecution. *Matter of S-M-J-*, 21 I & N Dec. 722 (BIA, 1997); *Matter of M-D-*, 21 I & N Dec. (BIA 1998). The federal appellate courts, however, have long recognized that asylum claimants do not always control their ability to produce the required corroboration:

> It is obvious that one who escapes persecution in his or her own land will rarely be in a position to bring documentary evidence or other kinds of corroboration to support a subsequent claim for asylum. It is equally obvious that one who flees torture at home will rarely have the foresight or means to do so in a manner that will enhance the chance of prevailing in a subsequent court battle in a foreign land. Common sense establishes that it is escape and flight, not litigation and corroboration, that is foremost in the mind of an alien who comes to these shores fleeing detention, torture and persecution.

Senathirajah v. INS, 157 F.3d 210, 215-216 (3rd Cir. 1998).

As a result, the immigration courts, BIA and the federal appellate bench are increasingly faced with the situation exemplified in the situation at bar where an alien who has fled from persecution in their home country offers as corroborating evidence documents sent to him from a person in the home country for use in the immigration proceedings where the alien seeks asylum. Prior to the Sixth Circuit's decision below, there was a developing consensus among the courts of appeals that, absent proof that the alien knew or had reason to know of the non-genuine nature of a document provided to the immigration court, the non-genuine document alone is insufficient to justify the denial or revocation of an alien's asylum claim.

The DHS regulation authorizing revocation of a previous grant of asylum states that the grant may be revoked where, "[t]here is a showing of fraud in the alien's application such that he or she was not eligible for asylum at the time it was granted." *8 C.F.R. Section 208.24(a)(1)*. The INA clearly states that document "fraud" occurs only where a respondent "knowingly" attempts to use a non-genuine document to obtain a benefit under the Act. *8 U.S.C. Section 1324c(a)*.

The leading case to address the issue of an alien's responsibility for the use in immigration proceedings of a non-genuine document provided to him by a relative who lives outside the United States is *Kourski v. Ashcroft*, 355 F.3d 1038 (7th Cir. 2004). The posture of *Kourski, supra*, is identical to the present matter. In that case the Seventh Circuit noted that the absence of evidence suggesting that Kourski himself had any reason to know the non-genuine nature of the birth certificate sent to him from his mother who was outside the U.S. eliminated any rational connection between the non-genuine documents and Kourski's own credibility or lack thereof:

> It (the adverse credibility finding) was unsupportable because the immigration judge did not find that Kourski knew or suspected that the birth certificate was a forgery. There is no evidence apart from his testimony concerning the circumstances in which his mother procured the forged birth certificate--whether *she* knew it was a forgery, which would be some evidence that Kourski really isn't Jewish. As far as the record and the findings are concerned, neither Kourski nor his mother knew. And if they didn't know, the fact of forgery cannot be evidence against the credibility of his testimony that he is Jewish. The testimony is neither corroborated nor undermined by a forgery of which he had, so far as appears, no knowledge.
>
> *****
>
> Without reason to believe that Kourski knew or suspected the forgery, however, proof that it was a forgery wouldn't be evidence that he was lying.

Id. at 1039-1040.

In its decision in *Berhe v. Ashcroft*, 393 F.3d 907. 912-914 (9th Cir. 2002), the Ninth Circuit expressly cited *Kourski, supra*, with approval and agreed that the mere existence of a non-genuine document standing alone without proof of the alien's knowledge of the non-genuine nature of the document is insufficient to justify the denial of asylum. The Ninth Circuit agreed that there must be evidence to prove that the alien knew or should have known that the document was not genuine to justify a finding of fraud by offering the document into evidence before an immigration court. *See also, Ymeri*

v. Ashcroft, 387 F.3d 12 (1st Cir. 2004) and *Forbes v. INS*, 48 F.3d 439, 442 (9th Cir. 1995).

Indeed, the Sixth Circuit below acknowledged that *Kourski, supra*, establishes the proper standard. *Mamadou Sy vs. Gonzales*, 199 Fed. Appx. 444; and 2006 U.S. App. LEXIS 24561 at 5. (App. 11a). But rather than adopt the *Kourski, supra*, rational, the Sixth Circuit attempted to create meaningless factual distinctions between the cases.

The Sixth Circuit claimed that the Sy documents had an "obviously fake appearance", *Id. at 5*. But this suggestion is contradicted by the testimony of DHS' own document examiner who explained at the immigration court hearing that he needed to use four different instruments, "hand held magnification", a "stereo microscope", an "illuminated desk magnifier" and a "video spectra comparature" to determine the non-genuine nature of the documents. (CAR 302). The DHS examiner conceded that there could be genuine Mauritanian documents that did not conform to the exemplars used by DHS and that the DHS sample book did not contain exemplars from all parts of Mauritania. (CAR 307-309). He also admitted there was no way to determine if Sy's documents were "certified" copies of valid Mauritanian documents. (CAR 315). Of even greater significance is that at the original asylum hearing neither the immigration judge nor the DHS attorney detected an "obviously fake appearance" in Exhibits 6 and 7.

The court below also attempted to distinguish *Kourski, supra*, because in this case Mr. Sy had submitted two documents that were alleged to be non-genuine. *Sy vs. Gonzales*, 2006 U.S. App. LEXIS 24561 at 5. (App. 11a). But the court failed to explain how one, rather than two, documents sent from Mauritania by Petitioner's sister would

make Mr. Sy more suspicious of the validity of the documents.

The Sixth Circuit also criticized Mr. Sy for providing additional corroborating documents "which bore little relation to the first set". *Sy vs. Gonzales*, 2006 U.S. App. LEXIS 24561 at 5. (App. 12a). While it is unclear what the court below meant by the phrase "little relation to the first set", since the BIA has imposed upon asylum applicants an affirmative duty to corroborate their claims, it makes no logical sense to claim that a diligent production of multiple documents to corroborate the claim constitutes an "evidentiary mea culpa" that any one document is knowingly fraudulent. *Id at 5*.

Finally, the court castigates Mr. Sy for the poor quality of his testimony despite the immigration judge's express declaration that, "I believe he's credible. . . ." (CAR 078).

In essence the Sixth Circuit readily acknowledged that it was contradicting a growing consensus among the circuits that DHS' allegations of fraud against aliens seeking escape from persecution must be supported by some credible evidence that the alien knew or should have known about the non-genuine nature of a document sent to the alien from his home country. The disingenuous disregard of the increasing consensus between the circuits comes at a time where greater, not less, uniformity in the evaluation of asylum claims is in the interest of both aliens seeking shelter from persecution and the security interests of the United States in assuring the identity of those seeking protection in this country.

Therefore, it is particularly appropriate that this Court address and clearly define the manner in which the circuit courts and the Executive Office of Immigration Review

balance the security interests of the United States with the safety concerns of refugees.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

E. DENNIS MUCHNICKI
(Ohio Supreme Court No. 0024734)
5650 Blazer Parkway
Dublin, Ohio 43017
(614) 761-9775

Counsel for Petitioner